STATE OF MICHIGAN

COURT OF APPEALS

WAYNE MUMROW and LEAH MUMROW,

UNPUBLISHED

Plaintiffs-Appellants,

v

No. 182037
Genesee Circuit Court

FIRST OF MICHIGAN CORPORATION and KEN
THOMPSON,

LC No. 94-028079-CZ

Defendants-Appellees.

Before: Young, P.J., and Markey and D.A. Teeple*, JJ.

YOUNG, J. (concurring in part and dissenting in part).

I concur in all aspects of the majority opinion except its resolution of the Michigan Consumer Protection Act (MCPA)[1] claim. Ironically, while I happen to agree with the *result* the majority reached in concluding that the security fraud claim is exempt from coverage under the MCPA, I am compelled to dissent because I believe that the issue is controlled by the decision, authored by my colleague on this panel, in *Smith v Globe Life Ins Co*, 223 Mich App 264; 565 NW2d 877 (1997). The majority has declined to cite *Globe* in its opinion or to explain why it is *not* the controlling authoritative opinion that we must follow pursuant to MCR 7.215(H)[2]

As noted in the majority opinion, although pleaded under several different theories, the essence of plaintiffs' case is that defendants engaged in securities fraud by placing them in a series of high risk investments, whereas plaintiffs allege that defendants led them to believe that they were investing in securities that would provide an assured, "safe" return. For the purpose of the MCPA analysis, it is important to note that the key "transaction" in each of the security investments at issue is the purchase of the securities from the defendant.

The majority holds, and correctly so absent the obligation to follow *Globe,* that these transactions are exempt under the MCPA. The majority's analysis of this claim is as follows:

> With respect to plaintiffs' MCPA claim, we find that summary disposition was
> also appropriate. The trial court granted defendants' motion under MCR 2.116(C)(8)

* Circuit judge, sitting on the Court of Appeals by assignment.

-1-

after correctly stating that it was unaware of any Michigan cases that permitted plaintiffs to state a claim under the MCPA for securities act violations.

In fact, MCLA 451.810(a); MSA 19.776(410)(a) sets forth a cause of action for persons alleging fraud or misrepresentation in connection with the sale of securities. We believe that because the conduct complained of here is subject to the very specific regulation and scrutiny by the Corporation and Securities Bureau of the Michigan Department of Commerce, it is exempt under § 4(1)(a) of the MCPA. We find that no factual development could possibly justify plaintiffs' right to recovery under the MCPA. *Schuster, supra*; *Caproni v Prudential Securities, Inc,* 15 F3d 614, 620-621 (CA 6, 1994); *Silverman v Niswonger*, 761 F Supp 464, 471-472 (ED Mich, 1991). Therefore, we also affirm the award of summary disposition with respect to plaintiffs' MCPA claims.

What I find most remarkable about this holding is that it is subscribed to by the author of *Globe;* this holding can be only read as a repudiation of *Globe*.[3] While I welcome any retreat from *Globe* by my colleagues and would welcome its timely demise, I believe that I am nonetheless bound by it until such time as a conflict with it is declared.

/s/ Robert P. Young, Jr.

[1] MCL 445.901 *et seq*.; MSA 19.418(1) *et seq*.

[2] The irony of my dissent is compounded by the fact that I believe that I am compelled to raise *Globe* as controlling authority *and* attack it as wrongly decided.

[3] The majority relies upon two federal cases, *Caproni v Prudential Securities, Inc*, 15 F3d 614 (CA 6 1994) and *Silverman v Niswonger,* 761 F Supp 464 (ED Mich, 1991), for the proposition that claims arising under the Michigan Securities Act are exempt from coverage under the MCPA. The irony of the majority reliance is that these two federal cases, in turn, rely upon *Kekel v Allstate Ins Co*, 144 Mich App 379; 375 NW2d 455 (1985), as authority for holding securities-related conduct exempt under the MCPA. However, *Globe* clearly destroys *Kekel* as binding authority. *Globe, supra* at 9-10.